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IN THE

Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP, AND WILLIAM VON WINKLE,

Petitioners,

v.

CITY OF NEW LONDON, AND NEW LONDON DEVELOPMENT CORPORATION,

Respondents.

On Writ of Certiorari to the Supreme Court of Connecticut

BRIEF OF *AMICUS CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS*

Under Rule 37.5 of this Court, the Becket Fund for Religious Liberty respectfully submits this brief as *amicus curiae* in support of Petitioners.[1] The Becket Fund for Religious Liberty is an interfaith, nonpartisan, public interest law firm dedicated to protecting the free expression of all religious traditions and the equal participation of religious people and institutions in public life and public benefits. It shares a common interest with religious organizations nationwide in assuring that rights to religious exercise are not infringed by land-use laws and policies.

The Becket Fund represents plaintiffs in a host of land-use cases across the country.[2] In addition, we have filed a series of

[1] All parties have consented to the filing of this brief, and copies of the consents have been filed with the Clerk. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus* and its members made any monetary contribution to the preparation and submission of this brief.

[2] *See, e.g., United States v. Maui County*, 298 F. Supp. 2d 1010, (D. Haw. 2003; *Hale O Kaula v. Maui Planning Comm'n*, 229 F. Supp. 2d 1056 (D. Haw. 2002); *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002); *Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002). *See also Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792 (W.D. Tex. Mar. 17, 2004); *Redwood Christian Schs. v. County of Alameda*, Civ. No. 01-4282 (N.D. Ca. filed Nov. 16, 2001) (pending); *Missionaries of Charity, Brothers v. City of Los Angeles*, Civ. No. 01-08511 (C.D. Ca. filed Sept. 19, 2001) (pending); *Archdiocese of Denver v. Town of Foxfield*, Civ. No. 01-3299 (Colo. Dist. Ct., Arapahoe Cy., Div. 5) (pending); *Great Lakes Society v. Georgetown Charter Township*, No. 03-4599-AA (Mich. Cir. Ct., Ottawa Cy.) (pending); *Temple B'nai Sholom v. City of Huntsville*, Civ. No. 01-1412 (N.D. Ala. removed June 1, 2001) (settlement agreement signed June 2003); *Greenwood Comm'y Church v. City of Greenwood Village*, Civ. No. 02-1426 (Colo. Dist. Ct.) (permit granted Dec. 2, 2002); *Living Waters Bible Church v. Town of Enfield*, Civ. No. 01-450 (D.N.H.) (agreement for entry of judgment signed Nov. 18, 2002); *Calvary Chapel O'Hare v. Village of Franklin Park*, Civ. No. 02-3338 (N.D. Ill.) (settlement agreement signed Sept. 3, 2002); *Refuge Temple Ministries v. City of Forest Park*, Civ. No. 01-

amicus curiae briefs in cases involving the rights of religious land owners under the Religious Land Use and Institutionalized Persons Act (RLUIPA).[3]

This *amicus curiae* brief presents a unique perspective on the actual, and substantial, burdens suffered by religious institutions when the government relies on the asserted purpose of generating more economic development and tax revenue as a basis for taking private property and giving it to another private party. *Amicus* believes that its experience in this area of the law will assist the Court in resolving this case.

SUMMARY OF ARGUMENT

Petitioners are being forcibly evicted from their homes in an eminent domain action by the city of New London, Connecticut, even though the condemned area is not blighted, the homes are structurally sound, and no highway or other public works project is being constructed. Instead, New London is destroying Petitioners' homes in order to transfer land to private parties who promise to develop commercial office space and perhaps generate tax revenue for the city. Petitioners' constitutional objections to these takings were rejected by the Connecticut Supreme Court.[4] In doing so, the lower court granted municipalities unprecedented power to take and condemn private property under a novel conception of public purpose—that of potential private economic development and increased tax revenue.[5]

To affirm this broad expansion of eminent domain power is to grant municipalities a special license to invade the autonomy of and take the property of religious institutions. Houses of worship and other religious institutions are, by their very nature, non-profit and almost universally tax-exempt. These fundamental characteristics of religious institutions render their property singularly vulnerable to being taken under the rationale approved by the lower court. Religious institutions will *always* be targets for eminent domain actions under a scheme that disfavors non-profit, tax-exempt property owners and replaces them with for-profit, tax-generating businesses. Such a result is particularly ironic, because religious institutions are generally exempted from taxes *precisely because* they are deemed to be "beneficial and stabilizing influences in community life." *Walz v. Comm'r*, 397 U.S. 664, 673 (1970).

In short, affirming the decision below would both declare open season on the taking of religious institutions of all faiths and functions (houses of worship, schools, hospitals, and soup kitchens, to name just a few), and turn the Fifth Amendment's "public purpose" requirement for takings squarely on its head.

0958 (N.D. Ga. filed Apr. 12, 2001) (consent order signed Mar. 2002); *Unitarian Universalist Church of Akron v. City of Fairlawn*, Civ. No. 00-3021 (N.D. Ohio) (settlement approved Oct. 1, 2001); *Haven Shores Community Church v. City of Grand Haven*, No. 1:00-CV-175 (W.D. Mich.) (consent decree signed Dec. 20, 2000).

[3] *See, e.g., Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214 (11th Cir. April 21, 2004) (*amicus* brief filed Nov. 21, 2003); *Fifth Avenue Presbyterian Church v. City of New York*, 293 F.3d 570 (2d Cir. 2002) (*amicus* brief filed on behalf of broad coalition, Mar. 15, 2002); *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. March 8, 2004) (*amicus* brief filed on behalf of a broad coalition Aug. 28, 2002); *C.L.U.B. v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003) (*amicus* brief filed June 26, 2002).

[4] *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004).

[5] *Id.* at 528.

ARGUMENT

I. RELIGIOUS INSTITUTIONS SUFFER SPECIAL DISADVANTAGE FROM GOVERNMENT ABUSE OF EMINENT DOMAIN POWERS IN THE NAME OF ECONOMIC DEVELOPMENT AND GENERATING TAX REVENUE.

The exercise of eminent domain power is often particularly destructive when applied to religious institutions.[6] When religious land uses such as houses of worship, schools, cemeteries, and soup kitchens are condemned, religious expression is unavoidably burdened.[7] In many instances, this burden arises because religious institutions have specifically dedicated their property to sacred use that is irreversibly destroyed when their property is taken and put to another use.[8]

Taking a religious institution's property also burdens religious exercise because these institutions generally select and maintain their properties for specific religious ends—ends that are inextricably intertwined with the chosen location of the property.[9] Accordingly, when the government seeks, through exercise of eminent domain, to dictate where a religious institution may or may not exist, it inevitably treads on that religious institution's autonomy and expression. For if the government can control where a religious institution may locate, the government inevitably comes to control the *kind* of mission a religious institution may pursue. Conforming religious institutions to the government's vision of the "proper place" for such institutions, in effect, imposes the government's vision of their "proper role."[10]

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[6] As one court has noted, because "[c]hurches are central to the religious exercise of most religions," preventing a church from maintaining its chosen "worship site fundamentally inhibits its ability to practice its religion." *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1226 (C.D. Cal. 2002).

[7] Indeed, this Court has recognized that converting property devoted to religious use to an alternative use favored by the government imposes a substantial burden on religious adherents. *See Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) (government decision to log land that was sacred to Native American plaintiffs would "have devastating effects on traditional Indian religious practices.") Nonetheless, this Court denied the Free Exercise claim in *Lyng* because the land that the plaintiffs sought to preserve for religious use was owned by the government. *See id.* (holding that a "devastating" burden on the plaintiffs' religious practice "do[es] not divest the Government of its right to use what is, after all, *its* land" because "the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government") (citation omitted). But, of course, the situation is quite different—and the implications for treading on the autonomy of a religious institution far graver—when it is the *government* that seeks to exact the property that the religious institution itself owns and sets aside for sacred use.

[8] For example, a church may specially set aside and bless certain land as a religious cemetery and take extraordinary measures to preserve that land as holy and undefiled.

[9] For example, an Orthodox Jewish synagogue will choose to locate in an area in which it is readily accessible to its congregants; an urban, storefront church will locate in the downtown business district near the people it seeks to serve and reach with its message; and a religious shelter will seek to locate in an area accessible to the homeless people to whom it seeks to minister.

[10] Precisely because takings of religious institutions' property do burden religious exercise, courts must carefully scrutinize the inherently discretionary decisions that are involved when the government seeks to condemn religious property. *See, e.g., Yonkers Racing Corp. and St. Joseph's Seminary v. City of Yonkers*, 858 F.2d 855 (2d Cir. 1988), *cert. denied by Yonkers Racing Corp. v. City of Yonkers*, 489 U.S. 1077 (1989) (applying strict scrutiny to City's condemnation of seminary's property); *Keeler v. Mayor & City Council of Cumberland*, 940 F. Supp. 879 (D. Md. 1996), *motion to vacate denied*, 951 F. Supp. 83 (D. Md. 1997) (regulatory taking substantially burdened free exercise and was not justified by compelling governmental interest); *Order of Friars Minor of the Province of the Most Holy Name v. Denver Urban Renewal Auth.*, 527 P.2d 804, 805 (Colo. 1974) (Colorado Supreme Court vacated trial court's

The condemnation at issue in the case at bar does not directly involve a religious institution. However, a judgment affirming the lower court's holding—that potential economic development and tax revenue growth concerns justify forced property transfers from one private owner to another—would place religious institutions at special risk of eminent domain actions. This risk is not merely hypothetical. Examples abound in recent years of municipalities expanding the notion of a taking for "public use" in order to justify the condemnation and transfer of religious institutions' property to for-profit companies that will purportedly generate more tax revenue.

For example, in *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, a church spent over five years acquiring property that was both centrally located to its congregants and sufficient in size to build a sanctuary that allowed the entire church body to assemble for worship together in accordance with the church's beliefs.[11] However, once the City discovered the church's intent to build a place of worship, it suddenly swept in and initiated eminent domain proceedings in order to transfer the church's property to a Costco. The City sought to justify the taking by asserting that Costco would bring more economic development and tax dollars than the proposed tax-exempt church.[12] Ultimately, the court held that the Fifth Amendment could not sustain this "naked transfer of property from one private property to another."[13] Moreover, the court found "significant" evidence that the City's asserted tax and economic justifications were cover for a "discriminatory intent"

order of immediate possession because City could not meet strict scrutiny standard).

[11] 218 F. Supp. 2d 1203, 1225 (C.D. Cal. 2002).

[12] *Id.*

[13] *Id.* at 1229.

aimed at "trying to keep [the church] out of the City."[14]

Another notorious example of how religious institutions are acutely vulnerable to takings based on tax revenue concerns is the landmark, but now discredited, case of *Poletown Neighborhood Council v. City of Detroit*.[15] In *Poletown*, politically powerful General Motors sought to build an assembly plant on a 465-acre Detroit neighborhood through eminent domain. The *Poletown* court asked, "[c]an a municipality use the power of eminent domain . . . to condemn property for transfer to a private corporation . . . thereby adding jobs and taxes to the economic base of the municipality and state," and answered in the affirmative.[16] That answer instantly condemned *twelve* neighborhood churches over extraordinary protest,[17] without a word of concern from the court.

For municipalities that lack the self-control to raise taxes or cut spending to balance budgets, a rule that allows them to transfer the tax-exempt property of religious institutions to a private business that will immediately add to the tax rolls is often too tempting to pass up—especially in times of municipal budget deficits and recession. A good example of this

[14] *Id.* at 1225.

[15] 304 N.W.2d 455 (1981). The lower court in this case relied in part on the *Poletown* precedent yet the Michigan Supreme Court recently overruled it emphatically. *See County of Wayne v. Hathcock*, 471 Mich. 445 (Mich. 2004).

[16] *Id.* at 457.

[17] JEANIE WYLIE, POLETOWN: COMMUNITY BETRAYED (1989). *See also* Derek Shearer, *Poletown: Community Destroyed*, 11 MULTINATIONAL MONITOR (Jan.-Feb.1990) (book review) ("When their efforts to preserve the community failed, the residents attempted to at least save Father Karasiewicz's Immaculate Conception Church, a community centerpiece. When their legal initiatives failed there too, dozens of residents, including many elderly women, occupied the church. They were eventually arrested, and the church, like the rest of Poletown, was razed.").

phenomenon at work occurred in East Saint Louis, Illinois. Though a mosque had purchased property to develop a worship center that would minister to the poor in a depressed area of the city, the city government preferred the immediate tax revenues that would be generated by a for-profit developer. Accordingly, it condemned the mosque's property and transferred it to a private rental housing developer.[18] Simply put, cities like East Saint Louis view religious institutions as a fiscal drain on city tax revenues during tough economic times. One court has even gone as far as to hold that the more religious institutions are attracted to a city (by low real estate prices) during economic downturns, "the more compelling the City's need to exclude them if it is to have any chance to succeed."[19]

Numerous other examples similarly illustrate that religious institutions are consistently targeted for condemnation and property transfer (to for-profit entities) by municipalities asserting economic development and tax revenue concerns.[20]

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[18] *See Southwestern Ill. Dev. Auth. v. Al-Muhajinum*, 744 N.E. 2d 308, 312 (Ill. App. 2001) (rejecting challenge by mosque to the condemnation of its property in order to transfer the property to a private rental housing developer).

[19] *International Church of the Foursquare Gospel v. City of Chicago Heights*, 955 F. Supp. 878, 881 (N.D. Ill. 1996) (upholding the city's denial of a special use permit for a church seeking to occupy an abandoned commercial building).

[20] The following sampling of cases demonstrates the widespread threat facing religious institutions across the country from revenue hungry municipalities.

- As part of a downtown revitalization plan, the city of Boynton Beach, Florida openly sought to transfer the Jesus House of Worship Church's property to private retail developers. The city declared it would rely on its eminent domain powers if the church remained unwilling to sell. *See* Gariot Louima, *Boynton Officials Ready to Buy, Raze Businesses*, PALM BEACH POST, Dec. 11, 2002 at 1B.

- In Normandy, Missouri, the Sisters of the Good Shepherd own a large parcel that serves as a convent, retirement home for aged sisters, and a shelter for drug-addicted women. The city, however, was not content with the good deeds of the sisters and instead sought to take the religious complex and replace it with a $53 million retail and commercial development. *See* D. Paul Harris, *Nuns in Normandy Get Ready for Fight Over Redevelopment; Sisters Say Their Area Is Lovely and City's Plan Seems "Ill-Conceived,"* ST. LOUIS POST- DISPATCH , July 29, 2002 at 1

- After City Chapel church converted a downtown four-story retail building into a church for its 100 members, the city of South Bend, Indiana condemned the building for private redevelopment. *See City Chapel Evangelical Free Inc. v. City of South Bend*, 744 N.E. 2d 443, 454 (Ind. 2001); Terrence Bland, *Church Site is "One More Piece of the Puzzle,"* SOUTH BEND TRIBUNE, Aug. 4, 2001, at A4.

- The city of New Rochelle, New York targeted two local churches for eminent domain actions in order to make way for a 309,000 square foot IKEA store. *See* Debra West, *IKEA Wants to Move In, but Neighbors Fight Moving Out*, N.Y. TIMES, Mar. 7, 2000, at B1; Lynn Cascio, *Protestors March to Embarrass IKEA*, JOURNAL NEWS, (Westchester Cty., NY), May 25, 2000, at 5B.

- In February 2002, the City of North Hempstead, New York moved for a surprise condemnation of St. Luke's Pentecostal Church after St. Luke's had completed an arduous permitting process to acquire the land, including litigation to acquire a parking variance. Unbeknownst to St. Luke's, its land had been slated for condemnation back in 1994, well before they applied for a single permit. Yet the city failed to inform St. Luke's of its demolition plans at any time before the actual condemnation and St. Luke's lost their church. *See* Stewart Ain, *Of Spiritual vs. Urban Renewal*, N.Y. TIMES, Apr. 16, 2000, at 14LI3; *In the Matter of the Application of North Hempstead Community Redev. Agency*, 2002 N.Y. Misc. LEXIS 1488, at *1-*2 (Aug. 29, 2002). Marni Soupcoff, *North Hempstead Bulldozes Constitutional Rights*, THE WESTBURY TIMES (Mineola, NY), Feb. 22, 2002. Victor Manuel Ramos, *In North Hempstead: A Spiritual Homecoming Deferred; Redevelopment Claims Dream of Church's Building*, NEWSDAY, Feb. 4, 2001, at G17.

Such high frequency of attacks gives testimony to the special

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- In September 2002, the city of Hillsboro, Oregon voted to condemn a Christian Science Reading Room in order to use the property for a private commercial and residential development to support a planned civic center. *See* William E. Dunn, *My Turn; Condemnation for City Building Bad Policy*, OREGONIAN (Portland, OR), Oct. 11, 2001, at West Zones 13; David R. Anderson, *Hillsboro Negotiates Deal to Build Civic Center*, OREGONIAN (Portland, OR), Sept. 4, 2002, at C2.

- In 2002 the city of Memphis designated a 15.5-acre parcel of land as the site for a new basketball stadium for use by private NBA teams. The area chosen for condemnation included churches that agreed to vacate after the city raised the threat of condemnation. *See* Deborah M. Clubb, *City Pays COGIC $1.8 Million for Lots Near Arena,* COMMERCIAL APPEAL (Memphis, TN), Mar. 7, 2002, at B1.

- Two Atlantic City, New Jersey churches were forced to sell their properties under threat of condemnation in order to give the property to the MGM Grand Casino. The churches were both destroyed, yet the MGM eventually chose to locate elsewhere. *See* Bill Kent, *Real-Life Monopoly: MGM Bids on the Boardwalk*, N.Y. TIMES, July 14, 1996, at 13NJ-6.

- In May 2001, the San Jose Redevelopment Agency targeted several churches for condemnation in order to secure land for a proposed 40 parcel high-density housing redevelopment plan. *See* Edwin Garcia, *Remaking Downtown San Jose; City Targets 40 Properties for Development as Housing, Landowners Who Refuse Plan Could Be Forced to Sell Sites*, San Jose Mercury News, May 12, 2001, at 1A.

- The Ventura City Council has targeted the property of a religious fraternal organization for condemnation in order to build a new cultural arts center. *See* John Scheibe, *City Council to Study Proposal for Arts Center; New 600-Seat Building Could Cost $21.8 Million to $26.7 Million*," VENTURA COUNTY STAR, August 4, 2003, at B01.

disadvantage religious institutions face under the broad reading of "public use" implemented by the court below. Because religious institutions are overwhelmingly non-profit and tax-exempt, they will generate less in tax revenues than virtually *any* proposed commercial or residential use. Accordingly, when a municipality considers what properties should be included under condemnation plans designed to increase for-profit development and increase taxable properties, the non-profit, tax-exempt property of religious institutions will by definition *always* qualify and *always* be vulnerable to seizure.[21]

Thus, should this Court affirm the lower court's weakening of the "public use" requirement, municipalities will have permission to declare open season on the property of religious institutions of all faiths and functions in the name of padding the public purse. Moreover, the religious organizations most at risk under such a regime are those small groups of believers, those minority faiths, those poor religious institutions, that cannot hope stand up to the power of large commercial enterprises aided and abetted by municipal governments.[22]

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[21] It is also significant that takings for traditional "public uses" such as building a road, constructing a government building, or providing a public right-of-way are *categorically* different from the types of takings that would be permitted in the name of generating more tax revenue. *All* private property, regardless of its present use and owner, is owned subject to the possibility that the government might one day need it for the traditional category of public purposes. In contrast, the class of properties eligible for being taken in the name of generating additional tax revenue is more limited and *is* dependent on the nature of the present use of the property, the identity of the owner, or both. Property that is already being put to uses that contribute to the government's desired level of tax revenue will not be subject to takings, whereas properties that do not (like religious institutions) will be.

[22] It bears noting that while religious institutions face additional eminent domain risks stemming from religious discrimination, many other charitable organizations will face similar dangers because of their tax-exempt status alone. Indeed, several charitable organizations have faced condemnation threats in recent years to satisfy municipal appetite for more tax revenue. *See, e.g.,* Sue Britt, *Moose Lodge Set for Court Fight;*

II. RELIGIOUS LAND USE INHERENTLY SERVES THE PUBLIC INTEREST, YET CONNECTICUT'S EMINENT DOMAIN STANDARD WOULD ENABLE FORCIBLY UPROOTING IT IN FAVOR OF PURELY PRIVATE INTERESTS.

Because religious institutions "uniquely contribute to the pluralism of American society by their religious activities," *Walz*, 397 U.S. at 689, society protects and encourages their activities through law and policy—most especially in the land use context.[23] Religious institutions' quintessential public

Group to Fight Home Depot Land Takeover," BELLEVILLE NEWS-DEMOCRAT (Missouri), April 1, 2002, at 1B (Moose Lodge faced condemnation in order to bring a Home Depot to the city); April McClellan-Copeland, *Hudson, American Legion Closer on Hall; City Wants Building to Demolish for Project*," PLAIN DEALER (Cleveland), March 8, 2003, at B3 (American Legion property faced condemnation to make way for small upscale shops, restaurants, and offices); Todd Wright, *Frenchtown Leaders Want Shelter to Move; Roadblock to Revitalization*? TALLAHASSEE DEMOCRAT, July 13, 2003, at A1 (describing threatened condemnation of homeless shelter to clear the way for business development); Joseph P. Smith, *Vote on Land Confiscation*, DAILY JOURNAL (Illinois), October 6, 2004, at 1A (detailing threatened condemnation of a Goodwill thrift store in order to build a shopping center).

[23] *See Texas Monthly v. Bullock*, 489 U.S. 1, 12 (1989) (property tax exemption for churches "possessed the legitimate secular purpose and effect of contributing to the community's moral and intellectual diversity"); *Boyajian v. Gatzunis*, 212 F.3d 1, 9 (1st Cir. 2000), *cert. denied by Boyajian v. Gatzunis*, 531 U.S. 1070 (2001)(recognizing that "religious institutions, by their nature, are compatible with every other type of land use and thus will not detract from the quality of life in any neighborhood."); *Concerned Citizens of Carderock v. Hubbard*, 84 F.Supp.2d 668, 674-75 (D. Md. 2000) ("It is certainly also reasonable to presume that 'churches ... and other places of worship' properly belong among this category of uses as wholly compatible with single family home life."; *Congregation Dovid Ben Nuchim v. Oak Park*, 199 N.W.2d 557, 559 (Mich. Ct. App. 1972) (holding that houses of worship bear "a real, substantial, and beneficial relationship to the public health, safety

mission makes them dependent on the general public's donations instead of profits. This dependence makes them highly sensitive to the power of taxation. Recognizing this truth, governments at all levels[24] exempt these inherently

and welfare of the community."); *Bd. of Zoning Appeals v. Schulte*, 172 N.E.2d 39, 43 (Ind. 1961) ("We judicially know that churches and schools promote the common welfare and the general public interest."); *Am. Friends of Soc'y of St. Pius v. Schwab*, 417 N.Y.S.2d 991, 993 (N.Y. App. Div. 1979), *appeal denied by Am. Friends of the Soc'y of St. Pius v. Schwab*, 425 N.Y.S.2d 1027 (N.Y. 1980) (recognizing the "public benefit and welfare which is itself an attribute of religious worship in a community."); *Bright Horizon House, Inc. v. Zoning Bd. of Appeals*, 469 N.Y.S.2d 851, 856 (N.Y. Sup. Ct. 1983) (affirming that "religious institutions, by their very nature, are beneficial to the public welfare."); *Board of Zoning Appeals* v. *Schulte*, 172 N.E.2d 39, 43 (Ind. 1961) ("We judicially know that churches and schools promote the common welfare and the general public interest."); *Young Israel Organization* v. *Dworkin*, 133 N.E.2d 174, 183 (Ohio Ct. App. 1956) ("To hold that a church is detrimental to the welfare of the people is in direct contradiction of historical truths and evidences a failure to recognize basic fundamentals of a democratic society."); *Congregation Comm. v. City Council*, 287 S.W.2d 700, 705 (Tex. Civ. App. 1956) ("The church in our American community has traditionally occupied the role of both teacher and guardian of morals. Restrictions against churches could therefore scarcely be predicated upon a purpose to protect public morals."); *Yanow* v. *Seven Oaks Park*, 94 A.2d 482, 491 (N.J. 1953) ("the welfare of the residential community demands [] inclusion [of houses of worship] in that area"). *See also* RATHKOPF & RATHKOPF, THE LAW OF ZONING AND PLANNING § 20.01, at 20-24 (recognizing that the exclusion of churches "either from the community as a whole or from a residential district therein—has no reasonable relationship to the public health, safety, morals, or general welfare."); KENNETH H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING § 12.22 at 578 (4th ed. 1996) ("[R]eligious uses contribute to the general welfare of the community. . . ."); Terry Rice, *Re-Evaluating the Balance Between Zoning Regulations and Religious and Educational Uses*, 8 PACE L. REV. 1, 3 (1988) (The "dominant status" of churches and schools "is based on a recognition that religious and educational institutions are, by their very nature, beneficial to the public welfare.").

[24] "All of the 50 States provide for tax exemption of places of worship, most of them doing so by constitutional guarantees. For so long as federal income taxes have had any potential impact on churches—over 75 years—religious organizations have been expressly exempt from the tax." *Walz*, 397 U.S. at

charitable organizations from taxation to avoid undercutting their general goal of furthering the public interest.[25]

The notion that religious institutions provide necessary public goods and should therefore be encouraged is as old as the founding itself.[26] Congress reaffirmed this commonsense policy when enacting the Revenue Act of 1938,[27] by stating that,

> "[t]he exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from other public funds, and by the benefits resulting from the promotion of the general welfare."[28]

The lower court's decision, however, turns this longstanding, axiomatic truth on its head. Under its permissive reading of the

676.

[25] "The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest." *Id.* at 672.

[26] "The absence of concern about [religious tax] exemptions could not have resulted from failure to foresee the possibility of their existence, for they were widespread during colonial days." *Id.* at 682. "Significantly, within a decade after ratification, at least four States passed statutes exempting the property of religious organizations from taxation." *Id. See also* 9 VA. STAT. AT LARGE 200 (1775-1778, Hening) (exempting from taxation "any . . . houses for divine worship, or seminary of learning."); N.Y. Laws of 1797-1800, c. 72, at 414 (exempting from taxation any "house or land belonging to . . . any church or place of public worship [or] alms house").

[27] Revenue Act of 1938, ch. 289, 52 Stat. 447.

[28] H. R. Rep. No. 1860, 75th Cong., 3d Sess., 19 (1938).

"public use" requirement, that which makes religious institutions worthy of government praise makes them doubly vulnerable to government avarice. Municipalities will *always* be able to gain short-term tax revenues by tearing down religious institutions and handing the land over to private businesses instead.[29] The lower court's standard requires no balancing whatsoever of the competing public goods that religious institutions are universally recognized to provide as a matter of law.[30] The court did not circumscribe its rationale or limit its holding strictly to the facts. In fact, all the lower court requires is that municipalities *intend* to take religious institutions' land for tax and economic development purposes.[31] These institutions will therefore be at the mercy of any municipality that merely claims that increased tax collection is in the public interest. Yet, as discussed *supra* § I, tax and economic concerns are often pretexts for outright discrimination against religious institutions.

In sum, the lower court does not acknowledge the serious, long-term, and (in many cases) irreversible damage to the general welfare that will result from its sweeping deference to municipalities that do more than mouth the mantra of more economic development and tax revenue. To affirm the lower

[29] "To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain. *Poletown's* 'economic benefit' rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity." *County of Wayne v. Hathcock*, 471 Mich. 445, 482 (Mich. 2004 While *amicus* concurs with this theoretical assessment, it believes that in practice, tax-exempt property owned by religious institutions will be one of the *primary* targets for municipal bulldozers, with minority faiths bearing the brunt of the discrimination.

[30] *See supra* n.23.

[31] *Kelo*, 843 A.2d at 541.

court's ruling would place the "benevolent neutrality toward churches and religious exercise"[32] traditionally shown by governments to religious institutions at grave risk.

CONCLUSION

For the foregoing reasons, the decision of the Connecticut Supreme Court should be reversed.

Respectfully submitted,

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[32] *Walz*, 397 U.S. at 676.